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September 14, 2005

VIA E-MAIL

Marlene H. Dortch Secretary Federal Communications Commission 445 12 Street, N.W., Room 8B201 Washington, D.C. 20554 **EX PARTE**

Re: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223

On September 13, 2005, the undersigned, along with Susan Davis and Angela Simpson of Covad Communications, Chris Mckee of XO Communications and Scott Sawyer of Conversent Communications LLC, met with Michelle Carey, legal advisor to Chairman Martin, to discuss issues related to Qwest's petition for forbearance in the Omaha MSA.

In the meetings, the undersigned, and representatives from the companies listed above, submitted the enclosed talking points which formed the basis of the presentation.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), one electronic copy of this notice is being filed in the above referenced proceeding.

Sincerely,

Thomas Jones

cc: Michelle Carey

EX PARTE PRESENTATION REGARDING QWEST PETITION FOR FORBEARANCE IN THE OMAHA MSA WC Dkt. 04-223 (September 13, 2005)

- THE STANDARD ADOPTED AND APPLIED BY THE FCC IN THE WIRELESS LNP FORBEARANCE ORDER, 17 FCC Rcd 14972 (2002)
 REQUIRES DENIAL OF THE QWEST PETITION WITH REGARD TO UNE LOOPS AND TRANSPORT
 - ➤ THE FCC INTERPRETED "NECESSARY" AS MEANING "CONSISTENT WITH" OR "IMPORTANT"
 - ➤ APPLYING THIS STANDARD, THE FCC DENIED VERIZON WIRELESS'
 PETITION FOR PERMANENT FORBEARANCE FROM LNP BECAUSE IT
 FOUND LNP WAS "NECESSARY" TO PROTECT CONSUMERS' INTEREST IN
 COMPETITION AND FORBEARANCE WAS NOT IN THE PUBLIC INTEREST
 - ➤ THERE WERE ON AVERAGE SIX CMRS CARRIERS IN EACH MARKET IN WHICH LNP WAS TO APPLY AND CMRS WAS DEEMED NOT TO BE A SUBSTITUTE FOR WIRELINE SERVICE; LNP UPGRADE COSTS WERE CHARACTERIZED BY CINGULAR AS "ENORMOUS" AND WIRELESS CARRIERS NEEDED FUNDS TO BUILD OUT THEIR NETWORKS
 - ➤ THE D.C. CIRCUIT UPHELD THE WIRELESS LNP FORBEARANCE ORDER IN CTIA v. FCC, 330 F.3d 502 (D.C. Cir. 2003)
 - ➢ IF LNP WAS "NECESSARY" TO PROMOTE COMPETITION IN THE ALREADY FIERCELY COMPETITIVE WIRELESS MARKET AND BETWEEN WIRELESS AND WIRELINE SERVICES THAT WERE (AND ARE) NOT EVEN SUBSTITUTES, UNE LOOPS AND TRANSPORT MUST BE NECESSARY TO PRESERVE COMPETITION IN OMAHA.
 - ➤ REQUIRING COSTLY LNP UPGRADES FOR WIRELESS CARRIERS WAS FAR LESS "IMPORTANT" TO THE PROTECTION OF CONSUMERS AND TO THE PROMOTION OF "COMPETITIVE MARKET CONDITIONS" THAN IS THE PRESERVATION OF LOOP AND TRANSPORT UNES IN OMAHA.

- AT THE VERY LEAST, AT&T V. FCC, 236 F.3d 729 (D.C. Cir. 2001)
 REQUIRES THAT THE PREREQUISITES FOR ELIMINATING UNES
 ESTABLISHED IN PRIOR ORDERS BE MET BEFORE THE FCC MAY
 FORBEAR FROM UNBUNDLING IN OMAHA; THOSE STANDARDS
 CANNOT BE MET HERE
- IT IS NOT ECONOMIC FOR COMPETITORS TO DEPLOY LOOPS AND TRANSPORT IN THE PARTS OF OMAHA IN WHICH UNBUNDLING IS REQUIRED UNDER THE TRRO
 - ➤ CLECS FACE THE SAME ENTRY BARRIERS FOR DEPLOYING TRANSMISSION FACILITIES IN OMAHA THAT THEY FACE IN OTHER PARTS OF THE COUNTRY; AT&T, MCI, MCLEODUSA AND ALLTEL ALL APPEAR TO RELY ON QWEST LOOPS TO PROVIDE SERVICE AT THE DS0, DS1 AND DS3 LEVELS
 - ONLY COX RELIES ON ITS OWN LOOPS AND TRANSPORT TO A GREATER DEGREE THAN IS NORMALLY THE CASE WITH CLECS
 - ➤ RESIDENTIAL MARKET: COX SERVES RESIDENTIAL CUSTOMERS, BUT THE FCC HAS HELD THAT THE PRESENCE OF A COMPETITOR WITH COMPETITIVE "ADVANTAGES AS A RESULT OF UNIQUE CIRCUMSTANCES" IS NOT A BASIS FOR CONCLUDING THAT OTHER CARRIERS ARE IMPAIRED WITHOUT ACCESS TO THE UNE DEPLOYED BY THE ADVANTAGED COMPETITOR. THIS IS ESPECIALLY TRUE WHERE THE INTERMODAL COMPETITOR DOES NOT OFFER ITS FACILITIES AT WHOLESALE:
 - * "We do not presume that a hypothetical entrant possesses any particular assets, legal entitlements or opportunities, even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances." *Triennial Review Remand Order*, 20 FCC Rcd 2533 n.77 (2005).
 - * "Cable telephony and cable modem service, for example, have developed because cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to other new entrants." *Triennial Review Order*, 18 FCC Rcd 16,978 ¶ 98 (2003).
 - * "When an intermodal technology is limited in availability to only one or a few telecommunications carriers... we will consider whether that technology contributes to a wholesale market in accessing the customer." Id.
 - ➤ THE FCC HAS NEVER HELD THAT THE PRESENCE OF A SINGLE COMPETITOR IS A SUFFICIENT BASIS FOR FINDING NON-IMPAIRMENT

- * "We therefore reject the arguments of some parties that just because one competitive LEC holds a particular set of assets, 'by extension, any efficient [competitive LEC]' must be deemed to hold those assets." *Triennial Review Remand Order* n.77.
- ➤ BUSINESS MARKETS: COX'S LIMITED PRESENCE IN THE BUSINESS MARKETS IS INSUFFICIENT TO SHOW NON-IMPAIRMENT
 - The data in the record is not disaggregated by transmission capacity and cannot be the basis for an impairment analysis of the DS0, DS1 and DS3 transmission facilities required by CLECs to serve business customers
 - ❖ According to GeoResults, Cox only serves [proprietary begin] [proprietary end] commercial buildings in the [proprietary begin] [proprietary end] Omaha wire centers in which Cox has most widely deployed its network
 - According to Cox's own data, of the [proprietary begin] [proprietary end]
 - Cox seems to provide DS1 and DS3 service over fiber loops for which it faces the same entry barriers as other competitors
 - Cox serves [proprietary begin] [proprietary end] business voice grade equivalents lines as compared to approximately [proprietary begin] [proprietary end] business access lines in the Omaha market.
- ELIMINATION OF LOOPS AND TRANSPORT IN OMAHA WOULD HARM RATHER THAN PROMOTE THE POLICY GOALS OF SECTION 706
 - ➤ ELIMINATING 251(c) UNE DSO LOOPS ELIMINATES ANY POSSIBILITY THAT A COMPETITOR OTHER THAN COX COULD COMPETE IN THE RESIDENTIAL BROADBAND MARKET
 - ➤ GIVEN COX'S LIMITED ABILITY TO SERVE THE BUSINESS MARKET, ELIMINATION OF UNE DS0, DS1 AND DS3 LOOPS AND DS1 AND DS3 TRANSPORT NEEDED TO SERVE BUSINESS CUSTOMERS WOULD LEAVE THE BUSINESS BROADBAND MARKET WITHOUT ANY SIGNIFICANT COMPETITION
 - ➤ THERE SHOULD BE NO CONCERN REGARDING DIFFERENTIAL REGULATORY TREATMENT FOR QWEST VERSUS COX
 - If Qwest wishes to compete with Cox on a more equal footing it must upgrade its network so that it can deliver video, voice and data; if it did so, Qwest would be exempt from unbundling in the mass market under the FTTC broadband unbundling exemption

❖ The FCC has already eliminated the other main source of differential regulatory treatment by classifying Qwest's broadband internet access service as an information service and by eliminating Computer II/III requirements for that service

- "ROBUST," "SUSTAINABLE" AND "ENDURING" COMPETITION HAS NOT DEVELOPED IN ANY PRODUCT MARKET IN OMAHA
 - > THE OMAHA MARKET IS NOT LIKE THE CMRS OR LONG DISTANCE MARKETS:
 - ❖ There are many stable and prospering competitors in those downstream retail markets that the FCC has found need not rely on UNEs
 - ❖ In Omaha there is only one such competitor in the residential market and there are none in the business market
 - > THE COMMISSION'S TREATMENT OF LINE SHARING CONFIRMS THAT IT HAS NEVER RELIED SOLELY ON THE PRESENCE OF A SINGLE FACILITIES-BASED COMPETITOR WITH LARGE MARKET SHARE IN THE DOWNSTREAM RETAIL MARKET AS A BASIS FOR ELIMINATING UNES